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No. 91-1657

IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

CHARLENE LEATHERMAN, et al,
Petitioners

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, et al,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

CITY OF GRAPEVINE, TEXAS' REPRINTED BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent provides the following information omitted from Petitioners' Statement of the Case because it is relevant to the questions presented for review.

This civil rights claim was originally filed on November 22, 1989, by Charlene and Kenneth Leatherman, individually and in their capacities as next friends of their minor son Travis Leatherman (the Leatherman Plaintiffs), against Defendants Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU), and Tarrant County, Texas. The Leatherman Plaintiffs claimed that the Defendants were liable to them, under 42 U.S.C. § 1983 and state law, for damages arising out of the alleged illegal entry and search of their residence. The Leatherman Plaintiffs filed this suit in the 96th Judicial District

Court of Tarrant County, Texas. The City of Grapevine, Texas is not a party Defendant to the Leatherman allegations.

On December 12, 1989, Defendants TCNICU and Tarrant county petitioned the United States District Court for the Northern District of Texas, Fort Worth Division, for removal of the Leatherman Plaintiffs' claims to federal court under 28 U.S.C. § 1331. (R. 1) On December 20, 1989, the Defendants filed their Answer (R. 13), and simultaneously filed a Motion to Dismiss or for Summary Judgment. (R. 18) On February 1, 1990, Judge David O. Belew, Jr. entered an order to dismiss the Leatherman Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) because their complaint failed to state a claim upon which relief could be granted; specifically, Plaintiffs' complaint failed to allege any custom, practice or usage from which a policy may be inferred, which would violate any constitutional rights of the Plaintiffs in this cause. (R. 70).

On February 8, 1990, the Leatherman Plaintiffs filed a Motion to Vacate Dismissal of Plaintiffs' Complaints. (R. 71) On March 8, 1990, the district court granted Plaintiffs' motion to vacate dismissal and granted the Plaintiffs leave to amend their complaint with the expectation that they would conform their pleadings to specifically state facts to support a failure to train based § 1983 claim.

On March 23, 1990, the Plaintiffs filed their First Amended Complaint. In this complaint the Leatherman Plaintiffs added the City of Lake Worth, Texas as an additional Defendant. The amended complaint also included as additional Plaintiffs Gerald Andert, Donald Andert, Lucy Andert, Pat Lealos, and Kevin and Jerri Lealos, individually and in their capacities as next friends of their minor children, Shane and Travor Lealos (The Lealos/Andert Plaintiffs). These new Plaintiffs asserted a separate cause of action and added the City of Grapevine, Texas as an additional Defendant. (Tr. 92) The amended complaint did not

specifically allege facts to support a failure to train based civil rights action.

On April 16 and April 17, 1990, both the City of Lake Worth (R. 125), and the City of Grapevine (R. 137), filed Original Answers. Concurrent with this activity the original Defendants, TCNICU and Tarrant County, filed their second Motion to Dismiss or for Summary Judgment. (R. 141) On June 7, 1990, these same two Defendants filed a Motion for a Protective Order. (R. 249) However, before these motions were decided by the court, a special order dated August 9, 1990 transferred the case from Judge Belew's court to Judge John H. McBride's. (R. 429)

On December 31, 1990, Judge McBride granted TCNICU and Tarrant County's protective order (R. 455), and on January 22, 1991, dismissed the Plaintiffs' complaint for a second time as to these two Defendants. In addition, the court dismissed the Plaintiffs' complaint against both Lake Worth and Grapevine. (R. 457)

The following is a brief description of the events which gave rise to the Andert/Lealos allegations against the City of Grapevine, Texas which allegations are the basis of this appeal. A similar description of the Leatherman allegations against the other Defendants is not provided here because the Leatherman Plaintiffs have made no claim against the City of Grapevine, Texas.

The Andert/Lealos Claims

On January 30, 1989, Sergeant R.W. Hart and Officer Tim Stewart of the Southlake Police Department answered an audible alarm call in the 2500 block of North Kimball in Southlake, Texas. Upon exiting his vehicle, Sgt. Hart smelled a very strong odor of phenacidic acid and ether. As a trained narcotics investigator, Sgt. Hart recognized these odors to be associated with the "cooking" of amphetamines. Officer Stewart also smelled the suspicious odor. (R. 179)

After contacting another officer from the Southlake Police Department and conducting a preliminary investigation, the officers contacted Sergeant Larry Traweek of the Tarrant County Narcotic Task Force to request assistance. Upon arrival, the Task Force members determined that there was an amphetamine lab in the immediate area. (R. 179) While searching for the source of the smell, the Task Force members pinpointed their investigation on a residence located at 2058 N. Kimball, belonging to Kevin and Jerry Lealos. Due to the fact that the wind was blowing from the South Southwest, the odor was very strong at the Northeast corner of the property, and could not be smelled on the south side of the property. (R. 183) However, Task Force members were unable to check the residence more closely because of several male subjects and a large dog in the yard. (R. 179)

Subsequently, Sgt. Traweek advised the Southlake Police Department that there was probable cause to begin gathering information in order to procure a search warrant. Besides the odor, the officers discovered several other reasons that made the issuance of the search warrant appropriate. A check of Water Department records indicated that water consumption at 2058 N. Kimball had risen from 13,000 gallons in December, 1988 to 17,000 gallons in January, 1989. Also, after acquiring the names of persons receiving mail at the residence from the post office, criminal history checks were run. The checks revealed that one of the subjects, Kevin Lealos, had an extensive criminal record. (R. 180)

When informed that the search warrant was written and signed Sgt. Hart when to the city manager and got permission to use the Grapevine Police Department Tactical Team for entry into the residence. In addition, Sgt. Hart told the city manager that he requested to have an ambulance and fire engine standing by. (R. 180)

The Grapevine Police Department Tactical Team, wearing black coveralls with the words "Grapevine Police" written in red

on their front pockets, entered the residence at approximately 8:00 p.m. As the Tactical Team entered the residence, they shouted "Police, get down!" numerous times. (R. 199) In fact, these shouts were heard by at least three officers who did not participate in the initial entry and were one block away from the residence at the time. (R. 181)

Once inside the residence, the Tactical Team members told the occupants to get down on the floor. One occupant of the residence, an older white male later identified as Gerald Andert, refused to get down on the floor and instead approached a member of the Tactical Team and became verbally abusive. Immediately thereafter, Gerald Andert lunged toward Police Officer Bewley and took hold of the barrel of his service revolver. (R. 197) Fearing that he was about to be disarmed, Officer Bewley struck Gerald Andert in the forehead with his flashlight. (R. 198) The Grapevine Tactical Team finished securing the house, requested medical assistance for Gerald Andert, and left when Southlake and Tarrant County Narcotic Task Force officers took charge of the scene. (R. 198)

Once inside the residence a search by Task Force officers revealed that there was not a drug lab on the premises at that time. (R. 185) At this point, the Southlake officers informed the occupants of the residence why they had executed a search of the home. Kevin Lealos, an occupant of the residence at the time of the search stated to officers that he thought the search was because of a van that was located on the premises. He stated that he had "loaned his van to someone and they had used it to boil some stuff in Euless." (R. 202) When officer Larry Traweek asked what was boiled in the van, Lealos refused to say anything more. (R. 202)

When brought to the ambulance by paramedics, Gerald Andert refused treatment for what the paramedics listed in their report as a "small contusion" on his forehead. (R. 200) The entire time that Gerald Andert was in police custody he was verbally abusive

to both the officers and the paramedics saying things such as, "Are one of you the assholes that hit me? You get that little punk back here with the blood on his stick that hit me and I'll kill him myself." (R. 202)

The search ended and the officers left the premises at approximately 9:15 p.m. All inclusive, the entire process took less than one and one-half hours. (R. 186)

SUMMARY OF ARGUMENT

The Fifth Circuit correctly affirmed the district court's finding that the Plaintiffs' conclusory allegations of municipal liability for failure to train under 42 U.S.C. § 1983 failed to state a claim on which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To properly allege a § 1983 action it was necessary for the Plaintiffs to set forth a highly particularized pleading containing facts to support their claim. *Rodriguez v. Avita*, 871 F.2d 552 (5th Cir. 1989). Plaintiffs did not do this and merely set forth boilerplate claims with one example of an alleged *failure to train*. Under both the Supreme Court decision of *Canton v. Harris*, 489 U.S. 378 (1989), and the Fifth Circuit opinion of *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), the one example made the basis of the present case is not enough to impose liability for failure to train, since the cited behaviour must "constitute gross negligence amounting to conscious indifference."

Once the district court concluded that the Plaintiffs failed to state a cause of action, the court correctly dismissed the Plaintiffs' claims sua sponte since it is widely acknowledged that it is within the discretion of the trial court to dismiss a complaint for failure to state a claim. Plaintiffs' conclusory boilerplate allegations had previously been dismissed for failure to state a claim and subsequently reinstated. The heightened pleading requirement preserves important functions and protections of official immunity while avoiding waste of taxpayer monies and judicial resources.

Elliott v. Perez, 751 F.2d 1472, 1477 (5th Cir. 1985). To establish a case of inadequate training the claimant must plead and prove facts "that the policy makers deliberately chose a training program which would prove inadequate". *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

In addition, the police officers who allegedly committed the civil rights violation. Greg Bewley and Larry Traweek, were recently granted take nothing judgments against the Andert/Lealos Plaintiffs with respect to the same facts made the basis of this suit. (See Appendix) Consequently, vindication of the individual officers' conduct renders moot the allegations of municipal liability for failing to adequately train the officers.

REASONS FOR NOT GRANTING THE PETITION

The Fifth Circuit correctly affirmed the district court's dismissal of the Andert/Lealos Plaintiffs' 42 U.S.C. § 1983 claims against Defendant City of Grapevine because the Plaintiffs failed to state a cause of action upon which relief could be granted. In an order dated January 22, 1990, the district court dismissed all of the Plaintiffs' claims against all of the Defendants. (R. 475) This order included dismissal of the claims against both Defendant Cities of Grapevine and Lake Worth even though no Motion for Dismissal or Summary Judgment was filed by these Defendants. The district court entered this sua sponte dismissal under Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs' pleadings failed to state a claim on which relief could be granted. Plaintiffs do not challenge the sua sponte nature of the district court's action on Petition for Writ of Certiorari.

—In their First Amended Complaint, the Plaintiffs brought their claims against the City of Grapevine pursuant to 42 U.S.C. § 1983. (R. 92) 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, a citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Specifically, the Plaintiffs have alleged that:

> . . . Defendant City of Grapevine failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of the City of Grapevine, by and through its official policymaker or policymakers, demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train . . .

Plaintiffs' First Amended Complaint (R. 104-105, 107) In order to understand why the district court dismissed these claims, it is helpful to review what is required to allege a § 1983 complaint against a municipality.

THE GRAVAMEN OF A 42 U.S.C. § 1983 MUNICIPAL LIABILITY ACTION

The landmark case in municipal liability under § 1983 is *Monell v. Department of Social Services,* 436 U.S. 658 (1978). In *Monell* the Plaintiffs challenged the Defendant's policy of requiring pregnant employees to take unpaid sick leave before it was medically necessary. The *Monell* holding establishes that § 1983 liability only applies to a municipality when the injury is visited pursuant to municipal "policy" or "custom." Since official policy is required, a municipality cannot be sued under § 1983 for injury inflicted solely by its employee or agent. In other words, the theory of respondeat superior is not enough to impose municipal liability. *Monell,* 436 U.S. at 677.

In *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985), the Supreme Court further defined what is necessary in order to impose municipal liability. In *Tuttle,* Oklahoma city was sued under § 1983 because a police officer allegedly violated Tuttle's rights by using "excessive force in his apprehension." The Plaintiff charged that a municipal "custom or policy" had led to the Constitutional violations. *Tuttle,* 471 U.S. at 811. In reversing the decision by the lower courts, the Supreme Court stated that "Where the policy relied upon is not itself unconstitutional, considerably more proof than the sign incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Tuttle,* 471 U.S. at 817.

Less than one year after *Tuttle,* the Supreme court decided *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). In *Pembaur,* the court readdressed itself to the question of whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy the requirement under *Monell* and § 1983 that the action be taken pursuant to official municipal policy. On this occasion, the court decided that, subject to restrictions, a municipality could be held liable for a single incident of unconstitutional behavior. Justice Brennan, writing for a plurality states, "Where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur,* 475 U.S. at 478.

However, after making this broad statement, the Court immediately sought to limit it by emphasizing that § 1983 liability only attaches when the decision was made by someone who possesses final authority to establish municipal policy. *Id.* In addition, the court limited municipal liability by stating that, "Municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur,* 475 U.S. at 479.

Finally, in *Canton v. Harris,* 489 U.S. 378 (1989), the Supreme Court held that failure to train municipal employees may serve as a basis for § 1983 liability only where it amounts to deliberate indifference to the rights of persons with whom the police come into contact. Furthermore, the deficiency in the city's training program must be closely related to the ultimate injury. The Supreme Court reasoned that the adoption of a lesser standard of fault would open municipalities up to enormous liability under § 1983 and would result in de facto respondeat superior. *Canton,* 489 U.S. at 387.

It is clear from applying the preceding Supreme Court cases to the facts of this case that the Plaintiffs did not plead a claim upon which relief could be granted. Plaintiffs urge that municipal liability for failure to train should be found for one incident of supposed failure to train. This is clearly not appropriate under the standards set by the Supreme Court for municipal liability under § 1983.

PLAINTIFFS' ALLEGATIONS LACK A STATED FACTUAL BASIS

Even if all of the Plaintiffs' allegations are taken as true, they still fail to state a cause of action of municipal liability for failure to train its police officers. In their complaint, the Plaintiffs use mere "boilerplate" language (which tracks the exact language used in *Canton*), without any factual statements to back it up. First, the Andert/Lealos search was a completely legal search. The fact that it did not uncover the suspected drug lab does not make the basis for the search faulty from the outset, as Plaintiffs would have this Court believe. Thus, the unsuccessful raid had nothing to do with any training in executing search warrants that the municipality might have adopted, the police had a right to be in the Lealos home at the time the incident occurred.

In addition, the claim that Gerald Andert was struck without provocation cannot be determined to have been caused by the City of Grapevine's policy of alleged "inadequate training." As the Supreme Court stated in *Tuttle,* ". . . it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from a conscious choice — that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle,* 471 U.S. at 817. Furthermore, Plaintiffs received a take nothing judgment in their trial against the individual officers accused of the wrongdoing in executing the warrant in question. (See Appendix)

In addition to the Supreme Court cases, the Fifth Circuit has a long standing tradition of being guarded concerning of § 1983 claims for municipal liability. Dealing with the issue of failure to train, the Fifth Circuit held in *Languirand* 717 F.2d at 227 that, "If there is a cause of action under § 1983 for failure to properly train a police officer whose negligent or grossly negligent performance of duty has injured a citizen, such failure to train must

constitute gross negligence amounting to conscious indifference. . ." *See e.g., Stokes v. Bullins,* 844 F.2d 269 (5th Cir. 1988); *Grandstaff v. Borger,* 767 F.2d 161 (5th Cir. 1985).

It is apparent from the pleadings in this case that, even if Plaintiffs' pleadings are taken as true, no action taken by any police officer involved in the incident could constitute "gross negligence amounting to conscious indifference" on the part of the City of Grapevine. Therefore, under all of the standards illustrated above, Plaintiffs' claims must fail.

Even if Plaintiffs had stated a substantive claim under § 1983, the form of their complaint still fails to meet the pleading requirements that the Fifth Circuit and other circuits have adopted in these cases. The Fifth Circuit has repeatedly held that the Plaintiff in such an action must set forth a highly particularized pleading because of the unique characteristics of a § 1983 action. *See, Rodriguez v. Avita,* 871 F.2d 514 (5th Cir. 1989); *Palmer v. San Antonio,* 810 F.2d 514 (5th Cir. 1987); *Morrison v. Baton Rouge,* 761 F.2d 242 (5th Cir. 1985) and; *Elliott v. Perez,* 751 F.2d 1472 (5th Cir. 1985).

In *Elliott,* the court explained that the lack of pleading with particularity "eviscerates important functions and protections of official immunity." *Id.* at 1476. The *Elliott* case has a very generous discussion of this entire field of law and provides a listing of other circuit's decisions requiring at least a minimum of specificity in the pleading of civil right's complaints. *Id.* at 1479.

In *Elliott,* Judge Higginbotham wrote a brief but noteworthy concurring opinion. While Judge Higginbotham agreed with the majority opinion, he pointed out that he would have reached this destination by following a different path. Instead of mandating a "heightened pleading" requirement in cases involving a potential immunity defense, Judge Higginbotham would merely rule that a petition fails to state a cause of action against governmental officials unless it includes a statement of sufficient facts that, if

true, would demonstrate the absence of immunity. *Id.* at 1482. Judge Higginbotham added that it does no violence to the concept of notice pleading to suggest that the adequacy of a pleading is case specific. In other words, Judge Higginbotham would require that to state an action where immunity is potentially involved, the case must be stated with specificity.

In this concurring opinion Judge Higginbotham also explained that

> Of course, some plaintiffs will be unable to state a claim without the benefit of discovery, even though discovery might have surfaced sufficient facts, but denial of some meritorious claims is the direct product of the immunity doctrine which weighed these losses when it struck the policy balance. This, at least for me, only makes the plainer that I am sure that I am on sure ground in concluding that the accommodation of notice pleading and immunity presents a question of claim definition, peculiarly within the authority granted to us by Art. III.

Id. at 1483.

Moreover, Judge Higginbotham would hold that the courts have the judicial authority to decide when a petition or complaint has been pleaded adequately to state a valid cause of action.

Petitioners cite *Streetman v. Jordan,* 918 F.2d 555 (5th Cir. 1990) on page 18 of their Petition for the proposition that the Fifth Circuit itself has acknowledged that application of the "heightened pleading" requirement may result in the dismissal of certain meritorious claims.

The language that Petitioners point to is located in footnote #2 on page 557 of the *Streetman* decision. Petitioners have taken the quote out of context for their own purposes. The entire footnote is as follows:

> This court is not unsympathetic to the dilemma the contours of this doctrine create for some § 1983 plaintiffs. Because the doctrine prevents them from seeking discovery, they frequently cannot collect sufficient facts to defeat the defense at the pleading stage. In the persuasive concurring opinion to *Elliott,* discussed previously, Judge Higginbotham recognized these conflicting interests, and reluctantly concluded that 'denial of some meritorious claims is the product of the immunity doctrine which weighed these losses when it struck the policy balance.'

Elliott, 751 F.2d at 1483 (Higginbotham concurring).

Basically, what Judge Higginbotham was saying is that while some meritorious claims may be denied by the "heightened pleading" requirement this fact was known when the immunity doctrine was being developed and this is a necessary cost, worth paying, for the doctrine as a whole.

While *Elliott* dealt with immunity of public officials, the same rationale behind the decision applies equally to municipal liability in § 1983 cases. In *Palmer*, the first Fifth Circuit case to deal with a § 1983 action against a municipality, the court used the same reasoning that was used in *Elliot* in requiring § 1983 Plaintiffs to state specific facts and not merely conclusory allegations against a municipality.

In addition, the policy reasons behind this pleading standard are the same for cases involving public officials and municipalities. Without a higher pleading standard in municipal liability cases, municipalities would be hailed into court in many instances when, under the substantive law of § 1983, these cases would eventually be thrown out because the Plaintiffs could not meet their burden of proof. This situation wastes both the taxpayer's money and scarce judicial resources. By adopting a heightened pleading standard at the outset, the Fifth Circuit is ensuring that

only truly meritorious § 1983 claims go forward, and that these meritorious claims are given the attention they rightfully deserve.

As the district court opinion correctly pointed out (R. 464), under the recent *Rodriguez* holding, boilerplate, conclusory allegations combined in a description of a single incident will not satisfy the pleading requirements for a § 1983 case. When dealing with a pleading no more generally worded than the one at hand, the Fifth Circuit in *Rodriguez* stated, "Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer — a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else." *Rodriguez*, 871 F.2d at 255.

In *Nieto v. San Perlita Independent School District,* 894 F.2d 174 (5th Cir. 1990), the Fifth Circuit addressed the rationale behind the doctrine of governmental immunity and the limitations of allowing offensive discovery by a claimant. The court stated that the "heightened pleading" obligation requires the plaintiff's complaint to state specific facts sufficient to overcome a qualified immunity defense. This requirement alleviates the defendants who may be entitled to official immunity from the burdens of traditional pretrial depositions, interrogatories and request for admissions. *Id.* at 178. Consequently, the court concluded, the plaintiff in a § 1983 suit must shoulder the burden of pleading a prima facie case, including the obligation of alleging detailed facts supporting the contention that a plea of immunity cannot be sustained. *Lynch v. Cannatella,* 810 F.2d 1363, 1376 (5th Cir. 1987), quoting *Morrison v. City of Baton Rouge,* 761 F.2d 242, 245 (5th Cir. 1985). *Nieto*, 894 F.2d at 178.

The *Nieto* court relied on United States Supreme Court authority to support the "heightened pleading" requirement by citing the case of *Mitchell v. Forsyth,* 472 U.S. 511 (1985) wherein the United States Supreme Court stated that "unless the plaintiff's allegations state a claim of violation of clearly estab-

lished law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 526. Furthermore, the Fifth Circuit held that once a complaint against an official adequately raises the likely issue of immunity, the district court should on its own authority require a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that a plea of immunity cannot be sustained. *Id.* at 178, citing *Elliott,* 751 F.2d at 1482.

In page 8 of the Petition for Writ of Certiorari, Petitioners state that it appeared that the Supreme Court would determine the validity of the "heightened pleading" requirement when it granted certiorari in *Siegart,* but eventually the U.S. Supreme Court affirmed the lower court's decision on other grounds. *Siegart v. Gilley,* 111 S.Ct. 1789, (1991). The *Siegart* court affirmed the lower court's decision by saying, "the court of appeals majority concluded that the District Court should have dismissed petitioner's suit because he had not overcome the defense of qualified immunity asserted by respondent. By a different line of reasoning, we reach the same conclusion, and the judgment of the Court of Appeals is therefore affirmed. *Id.* at 1794.

In *Siegart,* Justice Kennedy wrote a concurring opinion in favor of retaining the "heightened pleading" standard. Justice Kennedy's opinion stated in part:

> I would affirm for the reasons given by the court of appeals. Here malice is a requisite showing to avoid the bar of qualified immunity. The "heightened pleading" standard is a necessary and appropriate accommodation between the state of mind, component of malice and the objective test that prevails in qualified immunity analysis as a general matter. [T]here is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the "heightened pleading" requirement is the most workable means to resolve it. The "heightened pleading" standard is a departure from the usual pleading requirements of Fed. R. of Civ. P. 8 & 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.
>
> Upon the assertion of a qualified immunity defense, the plaintiff must put forward specific, non-conclusory factual allegations which establish malice, or face dismissal.

Siegert, 111 S.Ct. at 1295

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), *cert. denied sub nom, Propst v. Weir,* 112 S.Ct. 973 (U.S. Jan. 27, 1992) (No. 91-955) is cited by Petitioners on page 13 of the Petition for Writ of Certiorari for the proposition that the 5th Circuit's "heightened pleading" requirement has been rejected by the 7th Circuit Court of Appeals.

The Petitioners here are attempting to use this case on their behalf by stating that the 7th Circuit had "deprecated the heightened pleading requirement." In fact, the *Thomas* court does wrestle with the whole field of immunity and how it is best handled by the courts, but this same court does not openly reject the "heightened pleading" requirement. In fact, the court stated the following:

> Like Justice Kennedy, See *Siegart,* 111 S.Ct. at 1795 (concurring opinion), we think that the best solution to the conundrum is to require the plaintiff to produce "specific, non-conclusory, factual allegations which establish [the necessary mental state] or face dismissal" unless the plaintiff has the kernal of a case in hand, the defendant wins on immunity grounds in advance of discovery.

Thomas, 937 F.2d at 344-345. The court goes on to list a long series of cases that have adopted and elaborated on this approach.

Thereafter, the court added that they "deprecate" the expression "heightened pleading requirement" and would rather speak of the minimum quantum of proof required to defeat the initial motion for summary judgment. It appears that the Seventh Circuit is not comfortable with the phrase "heightened pleading requirement" although this court does appreciate the need to conform with the ruling of the U.S. Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Harlow* amplifies the need to protect the rights of entities and persons who may enjoy immunity. A higher level of pleading than is ordinarily required by the Rules may be called for in immunity cases. This is evident by their agreement with Judge Kennedy in *Siegart* that the plaintiff is required to present specific and non-conclusory factual allegations.

Another Seventh Circuit decision, *Estate of Himelstein V. Ft. Wayne*, 898 F.2d 573 (7th Cir. 1990), required pleading of specific facts by a § 1983 claimant. When speaking of the pleading requirements for a civil rights claim the court held that:

> A § 1983 claim does, indeed, require an allegation that some state actor deprived the plaintiff of a federal right. But, in order to state such a claim sufficiently, a plaintiff must allege facts that, if believed, would show that a federal right was actually violated. 42 U.S.C. § 1983 confers no substantive federal rights; rather, it is a remedial provision designed to afford redress for state deprivation of federal rights. Hence, no § 1983 action can be maintained until a federal right has actually been violated.

Id. at 575.

The Seventh Circuit upheld the dismissal of the lower court finding that the petitioners had failed to allege any facts in support of their claim that some federally guaranteed constitutional right had been violated.

SEVERAL CIRCUIT COURTS REQUIRE FACT PLEADING OF § 1983 CLAIMANTS

In *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49 (1st Cir. 1990), the First Circuit Court of Appeals held that the plaintiff's pleadings did not state a cause of action under § 1983 and further stated that the district court did not abuse its discretion in failing to grant the plaintiff a request for leave to amend his complaint. In reaching this decision, the First Circuit held that:

> Despite the highly deferential reading which we accord a litigant's complaint under Rule 12(b)(6), we need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions or outright vituperation . . . moreover, the Rule does not entitle the plaintiff to rest on "subjective characterizations" or conclusory descriptions of "a general scenario which could be dominated by unpleaded facts" . . . We understand, that for pleading purposes, the dividing line between sufficient facts and insufficient conclusions is "often blurred" . . . but the line must be plotted: it is only wh[illegible]h conclusions are logically compelled, or at least supp[illegible] by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that "conclusions" become "facts" for pleading purposes. . . . there is another principle at work as well. We have frequently recognized that, in cases where civil rights violations are alleged, particular care is required to balance the liberality of the civil rules with the need to prevent abusive and unfair vexation of defendants. . . . a civil rights complaint must "outline facts sufficient to convey specific instances of unlawful discrimination." . . . put another way, a plaintiff may not prevail simply by asserting an inequity and tacking on self-serving conclusions that the defendant was motivated by a discriminatory animus. The alleged facts must specifically identify the particu-

> lar instances of discriminatory treatment and, as a logical exercise, adequately support the thesis that the discrimination was unlawful. . . . Discrimination based on unprotected characteristics or garden-variety unfairness will not serve.

Id. at 52-53.

It is clear from the *Correa-Martinez* decision that the 1st Circuit requires a fairly significant level of pleading before a plaintiff's civil rights allegation will rise to the level of stating a valid cause of action.

Similarly, in *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977), (1978) the First Circuit upheld a district court's dismissal of a plaintiff's cause of action due to the fact that the plaintiff had pleaded with nonspecific and conslusory claims. On page 643 of this decision, the First Circuit held that conslusory allegations were inadequate to state a claim and that in an effort to control frivolous conspiracy suits under § 1983, federal courts have come to insist that the complaint state with specificity the facts that in the plaintiff's mind show the existence and scope of the alleged conspiracy. It has long been the law that in this and other circuits, that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claim with references to material fact.

In *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2nd Cir. 1972) the Second Circuit upheld the dismissal of the plaintiff's complaint for failure to raise a federal question in the body of the pleadings. This court held that mere conclusory allegations do not provide an adequate basis for the assertion of a claim for violations of §§ 1983 and 1943. The court held that the allegations were conclusory in that they failed to supply adequate facts to bolster concluded allegations. The court reasoned that because the pleadings contained merely the end product of the allegation and not the component parts, that is, only the conclusions and not the facts that those conclusions were

based on that there was not adequate notice to inform the defendants of the basis of the charges.

In *Rotolo v. Charleroi*, 532 F.2d 920 (3rd Circuit 1976) the plaintiff filed suit under § 1983. Thereafter, the district court dismissed the complaint and the petitioner appealed to the 3rd Circuit. The Third Circuit, after reviewing this decision, reversed and remanded to the lower court saying that the plaintiff should be entitled to amend, but along the way did write the following regarding appropriate pleading levels.

> In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims. Citing *Kauffman v. Moss*, 420 F.2d 1270, 1275-76 (3rd Cir. 1970).

Rotolo, 532 F.2d at 922.

In *District Counsel 47, American Federation v. Bradley*, 795 F.2d 310 (3rd Cir. 1986) several black probation officers filed employment discrimination claims alleging that they were the victims of discriminatory promotional examinations. The U.S. District Court for the Eastern District of Pennsylvania granted motions to dismiss these claims. The court of appeals vacated and remanded this decision holding that it was not necessary to the sufficiency of the complaint that plaintiff's identify each specific action taken by each individual plaintiff and secondly, that the district court should have at least granted plaintiff's leave to

amend their complaint. The Third Circuit decision speaks to the pleading requirements of civil rights complaints:

> Generally, we should construe pleadings liberally . . . however, it is undisputed that this court has established a higher threshold of factual specificity for civil rights complaints . . . a substantial number of these cases are frivolous or should be litigated in the state courts; they all cause defendants — public officials, policemen and citizens alike — considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in this litigation, and still keep the doors of the federal courts open to legitimate claims . . . We have said that "a civil rights complaint that relies on vague and conclusory allegations does not provide "fair notice" and will not survive a motion to dismiss.

Id. at 313.

In *Arnold v. Board of Education*, 880 F.2d 305 (11th Cir. 1989) parents of a minor brought a § 1983 action against school officials claiming that the officials pressured their teenage daughter into having an abortion. The United States District Court granted a defense motion to dismiss for failure to state grounds upon which relief could be granted. Plaintiffs thereafter appealed to the 11th Circuit. The Circuit Court affirmed in part, reversed in part and remanded for further proceedings. Before reaching its decision, the court did provide some enlightening language regarding pleading § 1983 claims.

> To state a claim for relief, Rule 8 of the Federal Rules of Civil Procedure merely requires "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). It is well established that a complaint is

> not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the complaint's allegations. *Id.* at 45, 78 S.Ct. at 101. Generally, the Federal Rules of Civil Procedure do not require a claimant to set forth in detail the facts upon which he bases his claim. *Id.* at 47, 78 S.Ct. at 102. Rather, cases in which the facts do not establish a true controversy are more properly disposed of through summary judgment. However, in an effort to eliminate non meritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases. *Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978). Typically, Rule 8 is applied more rigidly to allegations of conspiracy and absolute immunity, and to claims pled against a local government that the challenged conduct constitutes its official policy or custom.

Arnold, 880 F.2d at 310.

It is clear that while the Eleventh Circuit does not expressly adopt the phrase "heightened pleading" they, like several of the other circuits, require a higher than normal level of pleading to withstand a motion for dismissal in § 1983 cases.

CONCLUSION

The Fifth Circuit correctly affirmed the district court's dismissal in favor of Defendant City of Grapevine, Texas because Plaintiffs failed to state a cause of action on which relief could be granted. The basic premise of Plaintiffs' complaint fails because they failed to factually state a claim under 42 U.S.C. § 1983.

For the reasons stated, the United States Supreme Court should deny Petitioners' Petition for Writ of Certiorari, leave the judgments of the Fifth Circuit and district court undisturbed, with costs taxed to Petitioners.

Respectfully submitted,

FOWLER, WILES, NORTON
& KEITH, L.L.P.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing pleading has been forwarded to all counsel of record on this the ____ day of June, 1992.

_____
Kevin J. Keith

IN THE
United States District Court
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GERALD ANDERT, ET AL,
Plaintiffs,
vs.
GREG BEWLEY, ET AL,
Defendants

CIVIL ACTION
NO. 4-91-068-

MEMORANDUM OPINION
and
ORDER

This action was brought by Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Travor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, plaintiffs, against defendants, Greg Bewley and Larry Traweek, on January 30, 1991, to obtain relief under 42 U.S.C. § 1983 for alleged violations by defendants of rights guaranteed to plaintiffs by the United States Constitution.

Plaintiffs alleged that defendants are police officers who participated in execution of a search warrant at premises occupied by the plaintiffs ("Lealos residence"). One of the two sets of plaintiffs who were involved in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 755 F.Supp. 726 (N.D. Tex. 1991), *aff'd* 924 F.2d 1054 (5th Cir. 1992), are the same persons who are the plaintiffs in this action; and the police activity involved in this action is the same police activity with which the court dealt as to these persons in *Leatherman.*

The sole theory of recovery alleged by plaintiffs against Greg Bewley was that he was a participant in the search of the Lealos

residence the evening of January 30, 1989, and that while so engaged he caused an injury to Gerald Andert by use of excessive force. The heart of the cause of action alleged against Greg Bewley is as follows:

Liability Alleged Against Defendant Bewley

15.

. . . Specifically, Plaintiff Gerald Andert alleges that the use of force by Defendant Bewley when seizing Plaintiff caused 1) a significant injury to Plaintiff, which 2) resulted directly and only from the alleged use of force that was clearly excessive to the need; and 3) that the excessiveness of the force used by Defendant Bewley was objectively unreasonable under the circumstances. *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (en banc).

16.

Plaintiff Gerald Andert further alleges that Defendant Bewley was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Bewley was therefore acting "under color of law" when he violated the Plaintiff's constitutional rights.

17.

To state a claim under 42 U.S.C. Section 1983 plaintiffs need only allege two things: 1) the violation of a constitutional right, and 2) that the person alleged to have violated their rights was acting under color of law. *Gomez v. Toledo*, 446 U.S. 6345, 640 (180) The United States Court of Appeals for the Fifth Circuit has modified *Gomez v. Toledo* to require that

Plaintiffs in Section 1983 actions anticipate the possibility of an affirmative defense based on qualified immunity, and in this connection the Fifth Circuit requires Section 1983 plaintiffs to plead the basis of their claims in a manner "sufficiently specific to remove the cloak of protection afforded by an immunity defense." *Geter v. Fortenberry*, 882 F.2d 167, 170 (5th Cir. 1989) ("*Geter II*)"

18.

For the purposes of satisfying the pleading requirement referred to in the preceding paragraph, Plaintiff Gerald Andert would further allege that the actions taken by Defendant Bewley when seizing Plaintiff violated clearly established law in existence at the time which prohibited use of force which causes severe injury, is grossly disproportionate to the need for action under the circumstances, and which is inspired by malice rather than merely careless or unwise excess of zeal so that it amounts to an abuse of official power that shocks the conscience. *Mouille v. City of Live Oak*, 918 F.2d 548, 551 (5th Cir. 1990). Plaintiff Gerald Andert alleges that the stitches required to treat his head wound satisfies the "severe injury" element, and that in the absence of any resistance or provocation during the seizure by Plaintiff, that clearly established law would have provided an objectively reasonable officer in Defendant Bewley's position "with the ability reasonably to anticipate [that his] conduct [might] give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

Plaintiffs' Original Complaint at 6-8. As reflected by the trial evidence, Gerald Andert's claim of use by Greg Bewley of excessive force is related to a blow Greg Bewley struck on Gerald Andert's head with a flashlight immediately after Greg Bewley entered the residence in execution of the search warrant.

The heart of the liability allegations made by plaintiffs against Larry Traweek are as follows:

Liability Alleged Against Defendant Traweek

19.

When the United States Congress enacted Title 42, it intended to create a remedy in damages in favor of any person who has been subjected to the deprivation of a federal constitutional or statutory right by another person, or a governmental entity, who when violating the United States Constitution or laws has acted "under color of law." All Plaintiffs named herein allege Defendant Traweek is liable to them for the right to be free from unreasonable seizure protected by the Fourth Amendment, as alleged herein at paragraph 14. These Plaintiffs base their right to recovery from Defendant Traweek on the remedy created by the United States Congress when it enacted Title 42, United States Code, Section 1983.

20.

All Plaintiffs herein further allege that Defendant Traweek was acting within the course and scope of his authority as a police officer when he took the actions complained of by Plaintiffs in this complaint, and engaged in the actions alleged while he was purporting or pretending to act in the performance of his official duty. As a matter of fact and law Defendant Traweek was therefore acting "under color of law" when he violated the Plaintiffs' constitutional rights.

21.

For the purpose of satisfying the pleading requirement of the United States Court of Appeals for the Fifth Circuit requiring plaintiffs to anticipate possible assertions of an affirmative defense based on qualified immunity, referred to herein at paragraph 17, the Plaintiffs alleging liability against Defendant Traweek would respectfully allege further that under clearly established law in existence when Defendant Traweek took the

actions challenged by Plaintiffs, that a reasonable officer would have known that to detain and interrogate individuals inside a private residence for one and one half hours, after discovering beyond a reasonable doubt that no legal basis existed for such detention or interrogation, would likely "give rise to liability for damages." *Melear v. Spears*, 862 F.2d 117, 1183 (5th Cir. 1989).

Id. at 9-10. The trial evidence provided specificity in the form of testimony that while at the scene of the search Larry Traweek explained to occupants of the residence the reason for the search, was present in something of a supervisory capacity, did not engage in significant, if any, search himself, and did not cause the presence of the officers at the residence to be terminated at an earlier time.

Plaintiffs do not contest validity of the search warrant. It was issued on the basis of an affidavit of a police officer stating that the affiant was of the belief that at the Lealos residence there were "controlled substances and chemicals used to manufacture controlled substances." Defendants' ex. 6 at 1. The search warrant itself commanded search of the Lealos residence, "including all other structures, and places on the premises," for controlled substances "alleged to be kept and concealed." Defendants' ex. 4.

Plaintiffs do not seek by their complaint recovery from any person other than Greg Bewley and Larry Traweek, the sole defendants, nor do plaintiffs allege any theory of liability against Bewley or Traweek, other than the theories mentioned above. No liability was sought by the complaint to be imposed on Bewley or Traweek for the conduct of other persons involved in the execution of the search warrant.

The case was tried to the jury, commencing on April 20, 1992. After plaintiffs announced that they had rested, except for an offer of proof by one witness on the issue of damages only and the making of a "bill", Larry Traweek moved for motion for judgment

as a matter of law, as contemplated by Fed. R. Civ. R. 50(a). The court granted the motion because of the court's conclusion that plaintiffs had been fully heard with respect to all issues related to their liability claims against Larry Traweek and that, nonetheless, there was no legally sufficient evidentiary basis for a reasonable jury to have found for plaintiffs against Larry Traweek on the theory of recovery urged by plaintiffs against him. The court has concluded that plaintiffs failed to present evidence raising a case of liability against Larry Traweek because they failed to adduce any evidence that any injury suffered by any of the plaintiffs resulted from any conduct on the part of Larry Traweek that was objectively unreasonable or that was of an excessive nature or beyond that in which a reasonable officer, faced with the same situation facing Larry Traweek on the occasion in question, would have engaged. Moreover, the court has concluded from the evidence received during plaintiffs' trial presentation that the conduct of Larry Traweek was subject to the qualified immunity defense, as it is explained in *Mouille v. City of Live Oak*, 918 F.2d 548, 551-52 (5th Cir. 1990). Because the conduct in question occurred prior to the opinion of the Supreme Court in *Graham v. Conner*, 490 U.S. 386 (1989), the standards set forth in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A January 1981), are applicable to the qualified immunity inquiry. Evidence adduced during plaintiffs' case made clear that Larry Traweek's conduct on the occasion in question was not "grossly disproportionate to the need for action under the circumstances" and that it was not "inspired by malice . . . that it amounted to an abuse of official power that shocks the conscience. . . . " *Mouille*, 918 F.2d at 551.

The case of plaintiffs against Greg Bewley went to the jury for resolution of disputed facts by a special verdict as contemplated by Fed. R. Civ. P. 49(1). The jury found against plaintiffs on the first of a series of questions inquiring about existence of the elements of an excessive force cause of action, as such a cause of action is defined in *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.

1989). *See also Mouille*, 918 F.2d at 551. The jury's answer to Question No. 1 was that the jury was unable to find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head was a use by Greg Bewley of force that was clearly excessive to the need existing on the occasion in question. This jury finding compels entry of judgment in favor of Greg Bewley against Gerald Andert. Moreover, the jury found in answer to Question No. 5 that Greg Bewley's conduct in striking Gerald Andert was qualified immune. The court recognizes that the issue of qualified immunity normally is an issue of law to be determined by the court. In this case, there is uncertainty as to whether disputed fact elements exist as to the qualified immunity defense. If the matter was proper for resolution by the jury, the jury has resolved it in favor of Greg Bewley. If the conclusion were to be reached that the issue is one to be resolved by the court as a legal proposition, the court would conclude that the conduct of Greg Bewley about which Gerald Andert complains was qualified immune. The only reasonable conclusion that could be reached from the evidence is that Greg Bewley was not inspired by malice. While carelessness or unwise excess of zeal might be present (though the court is not saying that it is), there clearly was no malice on Greg Bewley's part and there certainly was no conduct on his part that "amounted to an abuse of official power that shocks the conscience." *Mouille* 918 F.2d at 551.

For the reasons given above, judgment should be entered for defendants, denying plaintiffs any recovery against either of them.

THE COURT SO ORDERS.

SIGNED April 21, 1992.

JOHN McBRYDE
United States District Judge

IN THE

United States District Court

NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GERALD ANDERT, ET AL,
Plaintiffs,
vs.
GREG BEWLEY, ET AL,
Defendants

CIVIL ACTION
NO. 4-91-068-

FINAL JUDGMENT

Consistent with the memorandum opinion and order signed by the court on this date,

The court ORDERS, ADJUDGES and DECREES that Plaintiffs, Gerald Andert, Kevin Lealos, Jerri Lealos, Shane Lealos, by and through his next friends Kevin Lealos and Jerri Lealos, Travor Lealos, by and through her next friends Kevin Lealos and Jerri Lealos, Pat Lealos and Don Andert, have and recover nothing from defendants, Greg Bewley and Larry Traweek, that plaintiffs' causes of action against defendants be, and are hereby, dismissed, and that defendants each have and recover costs of court incurred by them from plaintiffs, jointly and severally.

SIGNED April 21, 1992.

JOHN McBRYDE
United States District Judge

IN THE

United States District Court

NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GERALD ANDERT, ET AL, *Plaintiffs,* vs. GREG BEWLEY, ET AL, *Defendants*	CIVIL ACTION No. 4-91-068-

VERDICT OF THE JURY

We the Jury, return our answers to the following questions as our verdict in this case.

QUESTION NO. 1:

Do you find from a preponderance of the evidence that the conduct of Greg Bewley in striking Gerald Andert on the head constituted a use of force by Greg Bewley that was clearly excessive to the need existing on the occasion in question, taking into account all facts and circumstances existing at the time the force was used?

Answer "Yes" or "No."

ANSWER: NO

If you answered Question No. 1 "Yes," then answer Question No. 2; otherwise, do not answer Question No. 2.

QUESTION NO. 2:

Do you find from a preponderance of the evidence that the excessiveness of the force that was used by Greg Bewley in striking Gerald Andert on the head, if you have so found, was objectively unreasonable?

You are instructed that in determining whether the excessiveness of the force used by Greg Bewley in striking Gerald Andert on the head was "objectively unreasonable," you shall consider the matter from the standpoint of a reasonable officer on the scene, faced with the same circumstances that actually existed at the time, without regard to Greg Bewley's underlying intent or motivation, rather than with the 20/20 vision of hindsight, and you will allow for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Answer "Yes" or "No."

ANSWER: _____

If you have answered Question No. 2 "Yes," then answer Question No. 3; otherwise, do not answer Question No. 3.

QUESTION NO. 3:

Do you find from a preponderance of the evidence that Gerald Andert sustained a significant injury as a direct result, and only from the use of, the excessive force you have found to exist in answer to question No. 1?

Answer "Yes" or "No."

ANSWER: _____

If you have answered Question No. 3 "Yes," then answer Question No. 4; otherwise, do not answer Question No. 4.

QUESTION NO. 4:

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would fairly and reasonably compensate Gerald Andert for his damages, if any, which were a direct and proximate result of the force used by Greg Bewley in striking Gerald Andert on the head?

You are instructed that in answering Question No. 4 you shall take into account any physical pain and suffering and mental anguish you find from a preponderance of the evidence Gerald Andert sustained by reason of the force used by Greg Bewley in striking him on his head, and nothing else.

Answer in dollars and cents, or "None," in the blank space provided below.

ANSWER: _____

QUESTION NO. 5:

Do you find from a preponderance of the evidence that Greg Bewley's conduct in striking Gerald Andert on the head was qualified immune?

You are instructed that an officer's conduct is "qualified immune" if a reasonable officer, situated as Greg Bewley was situated on the occasion in question, could have concluded that his conduct did not violate Gerald Andert's right to be free from excessive force. You are further instructed that on the occasion in question Gerald Andert's right to be free from excessive force was to be free from severe injuries inflicted on him by a force that was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely carelessness or unwise excess of zeal, so that it amounted to an abuse of official power that shocks the conscience. You are further instructed that "malice" exists if the actor acts with evil motive or intent, or recklessly or with callous indifference to the injured party's right to be free from the use of excessive force during the course of a search and seizure.

Answer "Yes" or "No."

ANSWER: Yes

4/21/92	
(Date)	FOREPERSON
4/21/92	
(Date)	JOHN McBRYDE United States District Judge